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11 **UNITED STATES DISTRICT COURT**  
12 **CENTRAL DISTRICT OF CALIFORNIA**

14 VERNON MR. UNSWORTH,

15 Plaintiff,

16 vs.

17 ELON MUSK,

18 Defendant.

Case No. 2:18-cv-08048

Judge: Hon. Stephen V. Wilson

**DEFENDANT'S MOTION IN  
LIMINE NO. 2 TO EXCLUDE  
EVIDENCE OF HIS CELL PHONE  
REPLACEMENT**

Complaint Filed: September 17, 2018  
Trial Date: December 2, 2019

1 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

2 Defendant Elon Musk moves for an order, in limine, precluding Plaintiff  
3 Vernon Unsworth from introducing any evidence or testimony, or otherwise relying  
4 on the fact that Mr. Musk periodically replaces his cell phone and that his old cell  
5 phones are then wiped of data.

6 **ARGUMENT**

7 Mr. Musk moves for this order in limine because Mr. Unsworth has already  
8 attempted to manufacture an issue out of the fact that Mr. Musk sometimes replaces  
9 his cell phone.<sup>1</sup> This argument is a complete red herring. Mr. Musk's physical cell  
10 phone is irrelevant, especially where all information contained on Mr. Musk's  
11 phones is backed-up. Mr. Musk has testified that he replaces his cell phone on a  
12 regular basis, that the data contained on the cell phones is backed up to Mr. Musk's  
13 iCloud, and that the old cell phones are then wiped. (Omnibus Declaration of  
14 Michael Lifrak in Support of Motions in Limine ("Lifrak Decl."), Ex. 1(Musk Depo.  
15 312: 12 – 315: 18)). Mr. Musk has never testified at any time that his phones are  
16 "destroyed" as Mr. Unsworth has argued to this Court.<sup>2</sup> Mr. Musk's phones are  
17 replaced periodically and all data preserved for security purposes. (Declaration of  
18 Michael Lifrak in Support of Opposition to Motion to Compel, DKT 86-2, Ex. 1)  
19 None of this has anything to do with the issues in the case. The Court should  
20 exclude such evidence and testimony because it is not relevant under Fed.R.Evid.  
21 402, and its probative value is substantially outweighed by its prejudicial effect.  
22 Fed.R.Evid. 403.

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26 <sup>1</sup> Lifrak Decl. Exs. 1, 3 (Musk Depo. Tr. 312: 12 – 315: 18; Teller Depo. Tr. 31:  
19 – 37:6); and Second Joint Stipulation on Plaintiff's Motion to Compel, DKT 86.

27 <sup>2</sup> Second Joint Stipulation on Plaintiff's Motion to Compel, DKT 86, at 7, 11,  
28 12, 14, and 16.

**I. EVIDENCE ABOUT MR. MUSK’S CELL PHONE REPLACEMENT IS IRRELEVANT AND PREJUDICIAL.**

**A. Mr. Musk’s Cell Phone Replacement Practices Are Irrelevant**

Federal Rules of Evidence, Rule 402 provides that “[e]vidence which is not relevant is not admissible.” According to Rule 401, “Relevant evidence” means evidence that has a “tendency to make a fact more or less probable than it would be without the evidence.” Fed. R. Evid. 401. Mr. Musk’s cell phone replacement practices do not make the existence of any fact of consequence to the determination of this defamation claim any more or less probable.

These issues were first raised in a discovery dispute. Specifically, Mr. Unsworth moved to compel Mr. Musk to search his iCloud back-up for text messages responsive to Mr. Unsworth’s discovery requests. *See* DKT 86. Mr. Unsworth’s motion repeated inflammatory allegations that Mr. Musk “destroyed” or “wiped” his cell phones. *Id.* at 1, 11, 12, 14, 16. Mr. Unsworth ignored the facts that (a) all data was backed up on the iCloud; and (b) Mr. Musk was willing to search the iCloud using all the search terms proposed by Mr. Unsworth. *Id.* at 4-5. Mr. Musk brings this motion to avoid a similar irrelevant sideshow at trial. *See Mformation Techs., Inc. v. Research in Motion Ltd.*, 2012 WL 2339762, at \*2 (N.D. Cal. June 7, 2012) (excluding “all evidence of prior pretrial discovery disputes” as irrelevant); *Van v. Language Line Servs., Inc.*, No. 14-CV-03791-LHK, 2016 WL 3566980, at \*4 (N.D. Cal. June 30, 2016) (same).

**B. Evidence of Mr. Musk’s Cell Phone Replacement Practices is More Prejudicial than Probative**

Federal Rules of Evidence, Rule 403 allows the exclusion of relevant evidence if the probative value is substantially outweighed by its prejudicial effect. The prejudicial effect of admitting evidence of purported cell phone destruction would be substantial, especially where there is no actual evidence of destruction of any information. The unfair prejudice from even a suggestion before the jury that a

1 party did something wrong and destroyed evidence outweighs any minimal  
2 probative value.

3 Mr. Unsworth may argue that because Mr. Musk did not retain or “destroyed”  
4 his old phones, that he has something to hide, or has done something improper. This  
5 baseless implication of spoliation has the potential to confuse and inflame the jury.  
6 There is no evidence of spoliation, and it should not be part of the trial. Any  
7 implication that Mr. Musk has destroyed evidence can easily be misconstrued and  
8 would only serve to prejudice him to the jury. Accordingly, no such evidence or  
9 testimony should be permitted.

### 10 CONCLUSION

11 For the foregoing reasons, Mr. Musk respectfully request that the Court enter  
12 an order precluding Mr. Unsworth from eliciting or presenting any evidence,  
13 testimony or otherwise mentioning Mr. Musk’s cell phone replacement practices.  
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15 DATED: November 4, 2019

Respectfully submitted,

16 QUINN EMANUEL URQUHART &  
17 SULLIVAN, LLP

18  
19 By /s/ Alex Spiro

20 Alexander Spiro

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